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In the Supreme Court of the United States

OCTOBER TERM, 1980

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
APPELLANT

v.

DOUGLAS DEWEY AND WAUKESHA LIME AND
STONE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

REPLY BRIEF FOR THE APPELLANT

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1. In our opening brief, we argued that warrantless safety and health inspections pursuant to the Federal Mine Safety and Health Act of 1977 (Mine Safety Act), 30 U.S.C. (Supp. III) 801 *et seq.*, are permissible under the Fourth Amendment because such inspections meet the criteria established in *United States* v. *Biswell*, 406 U.S. 311 (1972), for valid warrantless administrative searches. Appellees do not appear to be in serious disagreement with our discussion of *Biswell* and our application of *Biswell's* principles to the inspection provisions of the Mine Safety Act. Appellees contend (Br. 15–16), however, that the administrative search exception applies only to "pervasively regu-

lated" industries—*i.e.*, those industries in which governmental regulation covers virtually all aspects of a business' operations and where the business is subject to licensing requirements—and that regulations protecting the health and safety of employees, no matter how detailed, cannot constitute sufficiently "pervasive" regulation to permit warrantless inspections. Appellees argue that because the Waukesha operation does not have to be licensed[1] and is subject to general regulations covering most businesses,[2] it is in no different position than the business involved in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), and all of the other businesses covered by the Occupational Safety and Health Act of 1970 ("OSHA"). This contention is without merit.

The Court in *Barlow's* did not suggest that a regulatory scheme directed solely at occupational safety and health conditions cannot be sufficiently pervasive to satisfy the *Biswell* criteria and therefore that war-

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[1] We note that some states have established a licensing system for mines, although Wisconsin apparently does not require an operator to obtain a license before commencing mining operations.

[2] Appellees assert (Br. 2) that the Waukesha quarry is subject to state inspection under a statute providing for inspection of all Wisconsin businesses, and that the first Wisconsin mining rules "following the federal scheme" were adopted in 1972. While this may be true, the record shows that since approximately 1914 the State of Wisconsin has set mining apart from regulation of industry generally by adopting a safety code relating specifically to the mining industry (see Bull deposition at 5–6 (Aug. 7, 1979)). Thus, for over 65 years, Wisconsin has treated mining separately from other businesses, as Congress has done under the Mine Safety Act and its predecessor statutes. In addition, as we noted in our opening brief (at 6, 32), Waukesha, unlike most businesses, is also subject to federal regulation, pursuant to 18 U.S.C. 843(f), as a permittee engaged in the lawful use of explosives.

rantless inspections under such a scheme may never be upheld. Instead, the Court held that a business does not fall within the *Biswell* exception simply because it is engaged in interstate commerce. 436 U.S. at 314. If the Court in *Barlow's* had meant to construe the Fourth Amendment as creating an absolute bar to warrantless inspections for health and safety purposes, it undoubtedly would have said so. Indeed, appellees appear to concede (Br. 14) that coal mines are pervasively regulated and may be inspected without a warrant. But, insofar as the Mine Safety Act's provisions are concerned, coal mines are no more pervasively regulated than are other mines, including stone quarries, that are covered by the Act.

Moreover, the health and safety conditions in the mining industry are not comparable to those in other industries. As we noted at some length in our opening brief (at 18–24), Congress found that mining is a uniquely hazardous industry and that workers employed in that industry require special protections not afforded to workers in other industries. There is no reason to question that congressional determination.[3]

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[3] Amici Kent Nowlin Construction, Inc., et al., refer (Br. 5–6, 14–15) to an agreement concerning regulatory jurisdiction between the Mine Safety and Health Administration and the Occupational Safety and Health Administration. 44 Fed. Reg. 22827–22830 (1979). Under Section 4(b)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 653(b)(1), OSHA does not have jurisdiction over working conditions of employees who are covered by another federal agency with statutory authority to enforce occupational safety and health standards. The purpose of the agreement is to facilitate orderly administration of the agencies' respective regulatory programs by avoiding the need to resolve jurisdictional questions on an ad hoc basis.

Amici argue (Br. 5–6) that this agreement demonstrates that Congress arbitrarily singled out certain businesses for inclusion under the Mine Safety Act while excluding other businesses in

2. Appellees also assert (Br. 6–7) that, even if stone quarries are pervasively regulated, because both the Mine Safety Act and OSHA are directed at ensuring healthful and safe working conditions for workers and because warrantless searches under OSHA were struck down in *Barlow's*, a like result is compelled here. As we pointed out in our opening brief (at 35–36), however, the Court in *Barlow's* firmly rejected the suggestion that the imposition of a warrant requirement in the OSHA context necessarily meant that warrantless search provisions in other regulatory statutes were constitutionally suspect. 436 U.S. at 321–322. Instead, the Court stated that "[t]he reasonableness of a warrantless search * * * will depend upon the specific enforcement needs and privacy guarantees of each statute." *Id.* at 321. We have demonstrated in our opening brief (at 18–33) that the enforcement needs and privacy guarantees of the Mine Safety Act are sufficient to sustain warrantless administrative searches.

3. Appellees next contend (Br. 18–20) that a search warrant is necessary in the context of administrative inspections pursuant to the Mine Safety Act because under the present warrantless inspection scheme the manner in which inspections are to be conducted and the standards for inspector conduct are left to the discretion of the officers in the field. In an effort to illustrate this point, appellees allege that in this case fed-

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which working conditions may be equally hazardous. But this case does not involve an equal protection challenge to the statutory classification, and the Act would clearly survive such a challenge in any event. We note in this connection that amici's statistics do not take account of the fact that miners, including those in the non-coal portion of the industry, are exposed to disabling, degenerative diseases whose effects may not become apparent for many years, nor do they take account of the severity of the injuries and illnesses in the mining industry.

eral mine inspector Brey failed to notify company officials of his arrival at Waukesha's premises and remained on those premises for more than one hour without being accompanied by Waukesha's representatives.

Appellees' objections are erroneous. To begin with, a search warrant requirement would add nothing to the protections that the Fourth Amendment already provides to mine operators with respect to the manner in which inspections are conducted. In *Dalia* v. *United States*, 441 U.S. 238, 255 (1979), this Court held that under the Fourth Amendment a search warrant must satisfy three basic requirements: it must (1) be issued by a neutral magistrate; (2) be based on probable cause; and (3) particularly describe the place to be searched and the property to be seized. The Court specifically rejected the argument that, in addition to these three requirements, "search warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant—subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'" *Id.* at 257 (footnote omitted). Thus, whether or not a warrant is required to inspect stone quarries and other mines, under the Fourth Amendment the same standard—"reasonableness"—governs the conduct of the officials performing the inspection.

For this reason, we fail to perceive how a warrant requirement would have prevented Brey from inspecting Waukesha's facility without notifying company officials of his presence, as appellees allege. If, in fact, Brey did perform an inspection without affording Waukesha's management an opportunity to accompany him, his conduct may have been in violation of Section

103(f) of the Mine Safety Act, 30 U.S.C. (Supp. III) 813(f). Thus, appellees' own example convincingly shows that the Act provides certain safeguards beyond those available under a warrant. Accordingly, Brey's possible violation of the statutory requirements does not provide any basis for holding the warrantless inspection provisions of the Act unconstitutional.

4. Appellees next complain (Br. 19) that the Mine Safety Act does not provide adequate legislative controls for warrantless searches because it does not establish a maximum number of annual inspections. But setting an absolute ceiling on the permissible number of annual inspections would frustrate the goals of the Act. The threat of inspection serves to deter violations of the Act's mandatory health and safety standards. If the Act did contain a maximum number of inspections, once a mine's yearly quota of inspections was met, the operator would have no incentive to remain in compliance with the standards until the following year. Furthermore, particularly hazardous conditions at certain mines may justify more frequent inspections at those mines than at others. Thus, fixing a rigid quota of annual inspections would be inconsistent with the purposes of the regulatory program.

Nor is such a result required by the Fourth Amendment. In *United States* v. *Biswell*, *supra*, the Court observed that frequent and unannounced inspections were necessary if inspections were to serve as a credible deterrent. 406 U.S. at 316. Furthermore, it is important to emphasize that if an operator believes, on the basis of the frequency of inspections, that he is being subjected to harassment, he can simply refuse entry. Mine inspectors are prohibited under the Act from making forcible warrantless entries. If the Secretary either institutes an injunctive proceeding to gain entry, or assesses a fine against the operator for refusing entry, the operator will have a full and complete

opportunity to establish his claim of harassment in court.

5. In our opening brief (at 28), we argued that a warrant requirement for inspections under the Mine Safety Act would result in heavy administrative costs at the expense of frustrating the very purpose of the Act—the protection of miners. Appellees assert in response (Br. 20) that there is no evidence that the warrant requirement for OSHA inspections has proven burdensome, and they further predict that the great majority of mine operators will consent to warrantless inspections.

In fact, however, the Secretary has recently reported a refusal rate under OSHA of approximately 2½%, resulting in nearly 1,400 refusals annually. 45 Fed. Reg. 65916, 65920 (1980). Furthermore, the Secretary has indicated that "[t]he time and resource expenditures required to evaluate and act upon these cases are significant, particularly in view of the facts that OSHA and the [Solicitor of Labor's] Office operate within a limited budget." *Ibid.* This same refusal rate would mean that, in addition to the 1,400 warrants required under OSHA, the Secretary would be forced to obtain close to 3,000 more warrants annually to carry out his responsibilities under the Mine Safety Act. Therefore, although the refusal rate may indeed be low and the great majority of operators may be expected to permit warrantless inspections, in view of the fact that the Act mandates a large number of annual inspections, even a low refusal rate would place an enormous burden on the limited resources of the agency charged with enforcement of the Act's safety and health standards, and on the courts.[4]

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[4]The amicus brief filed by the American Federation of Labor and Congress of Industrial Organizations (at 2-9) contains a

6. In our opening brief we argued (at 42–43) that Waukesha's management may be said to have consented "in effect" to warrantless inspections under the Mine Safety Act (see *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 271 (1973)), in light of the facts that Waukesha has permitted warrantless inspections by state officials since 1922 and has been subject to warrantless searches by federal mine inspectors since 1966 (under the Metal Act, a predecessor of the Mine Safety Act) and by federal explosives inspectors since 1970 (pursuant to 18 U.S.C. 843(f)). In addition, we argued (Br. 31) that operators of quarry and mill facilities such as Waukesha's are not likely to have substantial privacy interests subject to the protection of the Fourth Amendment. We noted, in this regard, that Waukesha allows inspection of its operation by a variety of outsiders, including labor union and insurance carrier representatives, and that Waukesha does not restrict public access to certain parts of its premises, including some of the areas that the Secretary sought to inspect.

Appellees assert (Br. 20–21) that the foregoing circumstances are insufficient to demonstrate that Waukesha has either "waived" its Fourth Amendment rights or affirmatively "consented" to warrantless inspections under the Mine Safety Act. We do not necessarily disagree with appellees' assertion that Waukesha's management has not been shown, as a factual matter, to have voluntarily consented to warrantless searches by federal mine inspectors. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). The burden of our argument, however, is not that Waukesha has given its actual consent to be searched without a warrant by any and all government officials,

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useful synopsis of the massive amount of litigation generated by the warrant requirement for OSHA inspections.

but that the operators of Waukesha's stone quarry and the operators of similar facilities subject to warrantless inspections under the Mine Safety Act have substantially reduced privacy interests in their facilities and that a warrant is not necessary to protect those interests.

Our argument is bolstered by the decision in *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978), where this Court reaffirmed the principle, established in *Katz* v. *United States*, 389 U.S. 347 (1967), that the "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." See also *United States* v. *Salvucci*, No. 79-244 (June 25, 1980), slip op. 8; *Rawlings* v. *Kentucky*, No. 79-5146 (June 25, 1980), slip op. 5-7. The Court in *Rakas* explained that in ascertaining whether a person may claim a legitimate expectation of privacy in a given area, it is necessary to refer either to property law concepts or to other socially recognized understandings regarding relationships of people to property. 439 U.S. at 144 n.12. The Court noted that "[o]ne of the main rights attaching to property is the right to exclude others, * * * and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Ibid.* However, the Court cautioned that "even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon." *Ibid.* See, *e.g.*, *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974); *Hester* v. *United States*, 265 U.S. 57, 58-59 (1924). Although these cases involved the question whether governmental action constituted a "search," the Court has

also emphasized that the magnitude of the privacy expectation is a key factor in determining whether the added protections of the Warrant Clause are applicable. See, *e.g.*, *Cardwell* v. *Lewis*, 417 U.S. 583,590 (1974) (plurality opinion); *Cady* v. *Dombrowski*, 413 U.S. 433, 442 (1973).

In the context of administrative searches of mines, we submit that the mere fact that a mine operator has a property interest in the premises does not necessarily establish that the operator's privacy interest is so substantial as to require search warrants, especially where the enforcement needs and privacy guarantees of the statute underscore the reasonableness of warrantless inspections. Where, as here, a major portion of the work at a quarry is conducted out of doors and the operator permits access to his property by numerous persons, it is not unreasonable for society to recognize that the operator enjoys a greatly diminished privacy interest in his premises. Because the privacy guarantees of the Mine Safety Act are sufficient to protect that diminished interest, and because, as Congress expressly found, enforcement of the regulatory scheme would be frustrated by a warrant requirement, we submit that warrantless administrative inspections of stone quarries and other mines are permissible under the Fourth Amendment.

7. Amici Kent Nowlin Construction, Inc., et al., contend (Br. 26) that because the Mine Safety Act contains criminal penalties, including possible imprisonment, for willful violations (30 U.S.C. (Supp. III) 820(d)), a warrant should be required for routine administrative inspections under the Act. But the business proprietors in *Biswell* and *Colonnade* were also subject to criminal sanctions;[5] the Court nevertheless

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[5] In *Biswell*, the owner of the pawnshop that was inspected without a warrant was indicted on six counts charging him with

upheld the statutory provisions for warrantless administrative inspections in those cases. Thus, the mere existence of criminal sanctions in a regulatory statute is clearly insufficient, under the Fourth Amendment, to require a search warrant.

Amici Kent Nowlin Construction, Inc., et al.; also contend (Br. 29) that the Ninth Circuit in *Marshall* v. *Wait*, 628 F.2d 1255 (1980), invalidated the warrantless inspection provision of the Mine Safety Act. As we pointed out in our opening brief (at 36), however, the court in *Wait* specifically refused to invalidate the Act's warrantless inspection provision on its face, but concluded only that a warrant was required to inspect the particular facility involved in that case.[6]

For the reasons stated above and in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

WADE H. MCCREE, JR.
Solicitor General

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failing to pay a special occupational tax, in violation of 26 U.S.C. 5801, possession of unregistered firearms that were also not identified by serial number, in violation of 26 U.S.C. 5841 and 5842, and failing to maintain proper records, in violation of 18 U.S.C. 923. 406 U.S. at 313 n.2. In *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), the proprietor was subject to prosecution under 26 U.S.C. (1964 ed.) 5606 for violating the regulatory requirements of 26 U.S.C. (1964 ed.) 5301.

[6] We note that the Seventh Circuit in *Andrus* v. *P-Burg Coal Co.*, No. 80-1916 (Apr. 1, 1981), has recently upheld warrantless inspections pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 (Supp. III) *et seq.*